IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 77-160

S. M. PATTERSON, Superintendent,
Ohio Correctional Medical Center,
Petitioner,

vs.

WILLIAM L. MOSS,
Respondent.

TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States District Court For The Southern District of Ohio, Eastern Division, Case No. C-2-75-609, is unreported. (Appendix page 27). The opinion of the United States Court Of Appeals For The Sixth Circuit, Case No. 76-2533, and a subsequent denial of rehearing, are as yet unreported. (Appendix pages 32 and 37).

[1] The superintendent of the Ohio Correctional Medical Center is now N. E. Kette.

JURISDICTIONAL BASIS

The decision of the United States Court of Appeals For The Sixth Circuit was entered May 20, 1977. (Appendix page 32). A petition for rehearing and suggestion of rehearing en banc was denied June 17, 1977. (Appendix page 37). Jurisdiction is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES A FINAL PAROLE REVOCATION HEARING SUBSEQUENT TO CONVICTION FOR A NEW FELONY OFFENSE WHERE SUCH CONVICTION MUST, BY OPERATION OF STATE LAW, BE SERVED CONSECUTIVELY TO THE FELONY OFFENSE UPON WHICH PAROLE WAS INITIALLY GRANTED.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

This case involves the construction and interpretation of Ohio Revised Code §§ 2929.41B(3), 2929.41C

(2), and 2967.25. Ohio Revised Code, Title 29. (Appendix pages 38 and 39).

STATEMENT OF THE CASE

As background, the interrelated case of *Inmates' Councilmatic Voice v. Rogers*, 541 F. 2d 633 (6th Cir. (1976), is essential to the disposition of this matter. On December 12, 1974, a three judge panel convened by the United States District Court For The Northern District Of Ohio, Eastern Division, entered judgment in the above styled case, and thereby adopted procedures for the operation of parole revocation by the Ohio Adult Parole Authority, hereinafter A.P.A., in light of this Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972). (Appendix page 13). The majority of those procedures, including the need for a final parole revocation hearing in all cases, were stipulated to by the A.P.A. (Appendix page 15). Two questions not stipulated to, however, both related to the timing of the final parole revocation hearing following conviction for a new felony offense. With respect to revocation after commission of a new felony by a parolee who was in state, the district court entered judgment for the plaintiffs that such revocation must take place within 60 days of the date of filing a detainer. With respect to commission of a new felony by a parolee who was out of state, the district court entered judgment for the A.P.A. that the 60 day requirement was tolled until custody was obtained by the A.P.A.

Upon appeal by the A.P.A., this Court vacated the decision of the three judge panel and remanded for entry of a new order. 422 U.S. 1031 (1975). Upon remand, the three judge district court reentered their order and the A.P.A. again appealed. (Appendix page 23). Upon appeal, the Sixth Circuit Court of Appeals

modified the time limit objected to by the A.P.A. and affirmed as to the cross appeal taken by the plaintiffs therein. 541 F. 2d *supra* at 636. During the period of the A.P.A.'s appeals, the time limit objected to by the A.P.A. was stayed, first by decision of this Court, and upon remand, by the Sixth Circuit Court of Appeals. 420 U.S. 986 (1975). It is within this framework that the present litigation arose.

On September 8, 1975, respondent, hereinafter Moss, filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241, with the United States District For The Southern District Of Ohio, Eastern Division.[2] Said petition alleged as error the failure of the A.P.A. to provide a hearing in revoking parole from a 1970 conviction. Upon consideration of the record, including a response to a supplemental order, (Appendix page 25), the district court entered judgment against Moss. The district court specifically held that under Ohio law, holding a parole revocation for Moss would be a futile exercise. (Appendix page 27).

Upon appeal, the United States Court Of Appeals For The Sixth Circuit reversed and remanded with instructions to the A.P.A. to provide Moss with a revocation hearing. (Appendix page 32). Without identifying particulars, the rationale of the decision is summarized in the blanket statement: "We are not convinced that provision of a revocation hearing is a useless gesture where a condition of parole is violated by an intervening felony conviction." (Appendix page

[2] Moss was then incarcerated at the London Correctional Institution and the petition was styled *William L. Moss v. Roger T. Overberg*. During the appellate process Moss was transferred, resulting in change in designation of the case.

35). Petitioner Patterson's application for rehearing en banc was denied and this application for certiorari has followed. (Appendix page 37). The mandate of the Court of Appeals has been stayed pending this application.

STATEMENT OF FACTS

On June 15, 1970, Moss, while represented by counsel, pled guilty to the crime of burglary of an inhabited dwelling, and, as a result, was sentenced to the Ohio State Reformatory for a term of from 5-30 years. On March 25, 1974, he was placed on furlough status, and on August 20, 1974, he was paroled.

Based on events occurring on August 24, 1974, 4 days after his parole, Moss was indicted for various felonies. On November 20, 1974, again while represented by counsel, Moss pled guilty to charges of forgery, assault, and possession of a weapon while under disability. Said conviction resulted in concurrent terms of 2-5 years, although consecutive to his 1970 conviction.

On December 6, 1974, Moss was returned to the Ohio penal system, and on December 13, 1974, he was declared a parole violator. His first appearance before the parole board was April, 1976. Moss' return to custody was prior to the district court opinion in *Inmates'*, *supra*.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The Court of Appeals decision is a blatant misapplication of the criteria of *Morrissey v. Brewer*, *supra*, and *Moody v. Daggett*, .. U.S. .., 97 S. Ct. 274

(1976). In essence, the Court of Appeals held that *Morrissey v. Brewer*, *supra*, and the due process clause of the Constitution require a final parole revocation hearing in all circumstances regardless of the statutory framework in which parole revocation occurs. As *Moody v. Daggett*, *supra*, makes clear, the dictates of due process are inherently related to the circumstances and dependent thereon.

In the Court of Appeals, all parties were in agreement, consistent with this Court's decision in *Morrissey v. Brewer*, *supra*, that Moss could not utilize a final parole revocation to relitigate the fact of his plea of guilty to the new felonies:

> "Obviously a parolee cannot relitigate issues determined against him in other forums as in the situation presented when the revocation is based on conviction of another crime." 408 U.S. *supra* at 490.

The sole question before the Court of Appeals therefore was whether under the Ohio system, a hearing on the question of mitigation should be held. As will appear herein, the Court of Appeals decision requires the A.P.A. to perform a futile task as relates to revocation of the prior offense for which Moss was on parole.

O.R.C. § 2929.41(B)(3) specifically provides:

> "(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:
>
> (3) When it is imposed for a new felony committed by a probationer, parolee, or escapee."

Such sentence is not subject to change by the A.P.A. *Stewart v. Maxwell*, 174 Ohio St. 180 (1963); *Johnson v. Haskins*, 20 Ohio St. 2d 156 (1969); *State ex rel*

Young v. Adult Parole Authority, 24 Ohio St. 2d 67 (1970); *Sawyer v. Salisbury*, 25 Ohio St. 2d 217 (1971). Yet this is exactly what the Court of Appeals decision would require the A.P.A. to do. Once a conviction has been shown, the only purpose of offering mitigation evidence would be for purposes of treating the second sentence as concurrent to the first, thus resulting in the anomolous situation that a parolee convicted of a new felony would be deemed on parole on his first sentence while incarcerated on a separate independent conviction committed while on that parole. It is for this reason that the district court in the present case, and in fact, every district court in Ohio which had heard the similar issue on habeas corpus had rejected the Court of Appeals result.

In support of its conclusion, the Court of Appeals devised a novel construction of O.R.C. § 2929.41B(3):

> "a more reasonable construction of Ohio Revised Code Section 2929.41(B)(3) is that it has nothing whatsoever to do with when a parole should be revoked, *but was designed to set out rules for the imposition of sentence on a subsequent conviction after a parole has been revoked.*" (Emphasis added). (Appendix page 36).

This construction is unwarranted and plainly erroneous.

In *Inmates' Councilmatic Voice v. Rogers*, *supra*, the premise of the modified opinion, secured after 2 years of litigation, was that the A.P.A. need not revoke a parolee accused of a new crime and over whom the A.P.A. exercised no custody, until such time as the criminal proceedings have terminated and the A.P.A. thereby obtains custody. *Burdette v. Nock*, 480 F. 2d

1010 (6th Cir. 1973). To hold therefore that O.R.C. § 2929.41B(3) is premised on a prior parole revocation is a contradiction per se, for, following *Inmates'*, *supra*, such revocation will not have occurred. Moreover, the plain language of O.R.C. § 2929.41B(3) counters the construction adopted by the Court of Appeals. The statute simply does not say "a parolee whose parole has been revoked and who has committed a new felony must be given a consecutive sentence." In this regard, the Court of Appeals has attempted to undo the modification of *Inmates'*, *supra*, by again requiring final parole revocation prior to the outcome of the criminal trial.

To be sure, O.R.C. § 2929.41B(3), on its face, says nothing about when parole should be revoked. It cannot, however, be so easily divorced from other sentencing and parole statutes. While the section does not authorize the sentencing court to revoke parole of the previous sentence (Court's footnote 3), the determination that the sentence is consecutive has this effect. O.R.C. § 2929.41C(2) specifically provides that the consecutive sentence be aggregated to provide a new minimum and maximum sentence. O.A.G. 75-097. The new aggregated minimum then determines the parolee's new parole eligibility on both the prior and the new sentence. O.R.C. § 2967.25. It is because of the statutory framework in which O.R.C. § 2929.41B(3) operates that imprisonment on the prior sentence is a consequence of the new felony conviction, and not the result of an assumed parole revocation. (Court's footnote 1).

At oral argument, the Court of Appeals focused almost exclusively on the effect of the stipulations entered into in the three judge district court decision

in *Inmates'*, *supra*. As the Court of Appeals correctly notes, counsel for Patterson admitted that stipulations were entered into which provided for a final parole revocation hearing in all cases, including those of a parolee convicted of a new crime. Based on this, the Court of Appeals believed that the A.P.A. was precluded from relitigation of the question and utilized a paraphrase from the modified decision in *Inmates'* itself as supporting the contention that the constitution required a hearing in these circumstances:

> "Regardless of how the statute is construed, we adhere to the opinion expressed in *Inmates' Councilmatic Voice v. Rodgers*, 541 F. 2d at 636, that a parolee convicted of a subsequent crime is entitled to a parole revocation hearing if he requests it and the hearing should be held within a reasonable time." (Appendix page 36).[3]

The stipulations in *Inmates'*, *supra* were entered into as a matter of policy by the A.P.A., for different practical reasons, and not as a concession of the constitutional claim. Therefore, even though never questioned by the A.P.A. in *Inmates'*, *supra*, course through the appellate courts, such stipulations cannot be deemed binding in a collateral habeas corpus action

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[3] As will appear, the paraphrase was taken out of context. By reference to the context the paraphrase relates to those instances, where, during ongoing criminal trials the A.P.A. is successful in obtaining custody of the parolee. In such circumstance, a hearing would be required for justification of the intervening custody of one who otherwise would be on bond. The modification of *Inmates'*, *supra*, related to requiring a hearing within 60 days for those parolees who had not obtained bond and were not available to the custody of the A.P.A.

involving pre-*Inmates*' facts, and in which the constitutional claim is squarely presented.

As a matter of policy, the A.P.A. agreed to a final parole revocation hearing in new crime cases for the purpose of earlier receiving mitigation evidence for future parole planning at the expiration of the intervening minimum term. O.R.C. §§ 2929.41C(2); 2967.25. Prior to *Inmates*', *supra*, the parolee's first appearance before the A.P.A. would be at the expiration of the new aggregated minimum and this would be his first opportunity to present mitigation as relates to future parole. Under *Inmates*' the presentation of mitigation evidence as relates to future parole occurs upon return to the institution. This is far different however than a concession that the constitution requires performance of a nullity as respects revocation of the prior offense on which parole was once granted. The Court of Appeals would require consideration of mitigation, not as an incident of future parole planning, but as a mechanism to convert consecutive sentences to concurrent. As above, under Ohio law, this result cannot obtain.

It may be that the Court of Appeals was questioning the legislature's judgment that all parolees convicted of a new felony must be given a consecutive sentence, thus insuring revocation of parole. *Gregg v. Georgia*, ... U.S. ..., 96 S. Ct. 2909 (1976); *Jurek v. Texas*, ... U.S. ..., 96 S. Ct. 2950 (1976); *Proffit v. Florida*, ... U.S. ..., 96 S. Ct. 2960 (1976); *Woodson v. North Carolina*, ... U.S. ..., 96 S. Ct. 2978 (1976); *Roberts v. Louisiana*, ... U.S. ..., 96 S. Ct. 3001 (1976). Such judgment however is more than rational. Parolees who violate the public's trust in their rehabilitation by conviction of a new felony should suffer the consequences

of their own doing. Even counsel for Moss, on oral argument, admitted that the sole ground of "mitigation" which Moss would seek to raise was that his guilty plea was involuntary.

Relying on their own prior decision in *Preston v. Piggman*, 496 F. 2d 270 (6th Cir. 1974), the Court of Appeals herein held "[t]he automatic revocation of parole for every parole violation regardless of the mitigating circumstances clearly runs counter to the dictates of the [Supreme] Court in *Morrissey v. Brewer*." (Appendix page 35). Unlike *Morrissey*, *supra*, and *Preston v. Piggman*, *supra*, both involving technical violations of parole, Ohio's automatic revocation is delimited to convictions of new felony crimes. In *Moody v. Daggett*, *supra*, this Court held that the federal parole authority could await the service of an intervening sentence prior to determining future parole consequences, in order to trace the degree of rehabilitation evidenced during the intervening sentence. In Moss' case and under the pre-*Inmates*' framework, the A.P.A. awaited service of the intervening minimum sentence upon conviction of a parolee for a new felony for the same purpose. *Moody v. Daggett*, *supra*, makes clear that due process is not as inflexible as the Court of Appeals has held. *Reese v. United States Board of Parole*, 536 F. 2d 231 (9th Cir. 1976).

Certiorari should be granted to disaffirm the Court of Appeals decision, which is contrary to applicable decisions by this Court. Such decision affects not only Moss but all Ohio parolees of the same category recommited prior to *Inmates*', *supra*.

CONCLUSION

The Court of Appeals opinion constitutes a misapplication of *Morrissey v. Brewer*, *supra*, and *Moody v. Daggett*, *supra*. The petition for writ of certiorari should be granted and reversal entered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded to respondent, William L. Moss, through the office of his counsel James P. Luton, 5900 North High Street, Columbus, Ohio, 43085, via the United States Mail, this ... day of July, 1977. I hereby certify that all persons required to be served have been so served.

LEO J. CONWAY
Assistant Attorney General

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE No. C 72-1052

JUDGE CELEBREZZE
JUDGE GREEN
JUDGE CONTIE

INMATES' COUNCILMATIC VOICE, et al.,
Plaintiffs,

vs.

DAVID ROGERS, et al.,
Defendants.

JUDGMENT ENTRY AND ORDER
[FILED DEC. 12, 1974]

This case was heard by this Court on cross motions for summary judgment, a stipulation, and the oral arguments of the parties. The attached Exhibit "A" represents the stipulation as approved by the Court and is incorporated herein as if fully rewritten.

Pursuant to the Memorandum Opinion filed by the Court herein, it is ORDERED, ADJUDGED, DECREED and DECLARED that the manner in which the Defendants herein had been enforcing Ohio Revised Code Chapters 2967 and 5149 as they relate to the revocation of parole is unconstitutional. It is FURTHER ORDERED, ADJUDGED, DECREED and DECLARED that the principles set forth in Ex-

hibit "A" represent the minimum due process requirements which must be met in causing the revocation of parole under Ohio Revised Code Chapters 2967 and 5149 after the date of this order.

The Court, having been informed that a written recitation of parole revocation procedures complying with Exhibit "A" and this Order has not as yet been prepared by defendants, further orders that any procedures established by defendants to effectuate this Order be submitted both to the Court and to counsel for plaintiffs at least ten days prior to their effective date. Pursuant to the Court's said Memorandum Opinion herein, paragraph seven of Exhibit "A" represents a finding in plaintiffs' favor (that is, it is plaintiffs' alternative paragraph seven as presented to the Court in the parties' aforesaid stipulation, the Court having rejected defendants proposed paragraph seven), and paragraph nine thereof represents a finding in defendants' favor, the Court having rejected plaintiffs' proposed paragraph nine.

/s/ ANTHONY J. CELEBREZZE
United States Circuit Judge

/s/ BEN C. GREEN
United States District Judge

/s/ LEROY J. CONTIE, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. C 72-1052

JUDGE CELEBREZZE
JUDGE GREEN
JUDGE CONTIE

INMATES' COUNCILMATIC VOICE, et al.,
Plaintiffs,

vs.

DAVID ROGERS, et al.,
Defendants.

STIPULATION

1. This Court has jurisdiction of this action under 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. §§ 2201 and 2202.

2. This action is properly maintained by plaintiff Inmate Councilmatic Voice, an unincorporated association representing the interests of the inmates of the Cuyahoga County Jail. The individual claims of the named plaintiffs, the class action motion and any claims for money damages brought in this action are voluntarily dismissed. The plaintiff, Inmate Councilmatic Voice is recognized by the defendants solely for the purpose of this case and does not imply the recognition of it for any other purposes.

3. This is a proper action for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284.

4. This is a proper action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

5. Plaintiffs do not contest the constitutionality of the Ohio Revised Code Chapters 2967 and 5149 to the extent that they provide the authority for the revocation of parole. The procedures set forth below will allow these defendants to carry out their duties under those chapters in compliance with the decisions of the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 718 (1973).

6. When a parolee is arrested and held by means of a detainer placed on the authority of or at the direction of an officer of the Adult Parole Authority, the parolee so arrested or held shall be given a preliminary parole revocation hearing within ten business days of the date of the placement of the detainer and the following requirements shall apply in such cases:

(A) The preliminary hearing shall be for the purpose of determining whether or not there is probable cause or reasonable grounds to believe that the parolee has committed acts which would constitute a violation of the terms and conditions of parole.

(B) The hearing officer at said hearing shall be someone who has not been involved in the parolee's case and neither the officer nor the person who appoints the officer prior to said hearing shall review any material or consult with any person concerning any matter which must be ruled on at the hearing.

(C) The parolee shall be permitted to appear at the hearing, to speak in his own behalf, and to bring letters, documents, or individuals who can give relevant information to the hearing officer. Said individuals shall be subpoenaed by the Adult Parole Authority as reasonably requested by the parolee.

(D) Persons who have given adverse information on which the parole revocation is to be decided shall be made available for questioning and cross-examination by the parolee, unless the hearing officer determines that the identity of such persons are not known to the parolee and that such persons would be subjected to the risk of harm if their identities were disclosed.

(E) A summary or digest of the evidence and the proceedings shall be prepared by the hearing officer and shall include the specific reasons for nondisclosure of the identity of any person under paragraph 6(D) of this order.

(F) The hearing officer shall determine and inform the parolee at the hearing whether there is probable cause to hold the parolee for final decision on revocation. His decision shall be based only on the evidence raised at said hearing and he shall state the reasons for his decision and the evidence relied on in his summary or digest, a copy of which shall be provided to the parolee as soon as it is prepared.

(G) Counsel whether assigned or retained, shall be permitted in cases wherein, after being informed of his right to request counsel, the parolee makes such a request, based on a timely and color-

able claim (i) that he has not committed the alleged violations of the conditions of his parole; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or to present. In passing on the request for appointment of counsel, the hearing officer shall consider whether the parolee appears to be capable of speaking effectively for himself. In all cases in which counsel is not provided for the parolee, the reasons for denial shall be succinctly stated in the summary or digest prepared by the hearing officer.

(H) A written notice shall be given to the parolee within five days after a detainer has been placed on him notifying him of the specific parole violations which have been alleged and further notifying him of his right to a preliminary parole revocation hearing, stating the time and place at which his hearing will be held, and informing him of his rights at said hearing.

(I) In the event that the hearing officer finds probable cause that the parolee has violated the conditions of his parole, he shall report such findings to the A.P.A., which, if it concurs in such finding, shall declare the parolee to be a violator of his parole, as that term is used in Section 2967.15, Ohio Revised Code.

(J) To the extent that a parolee's alleged violation of parole results from facts for which he has been charged with a criminal offense or offenses

allegedly committed while on parole, the preliminary hearing procedures which the Ohio Revised Code provides for the determination whether probable cause exists to bind the accused over to the grand jury may be employed as a substitute for the procedure outlined in paragraphs (A) through (I) above, when the following provisions are met: 1. The parolee receives notice that such hearing will serve as the preliminary hearing on his parole revocation; and 2. a record or summary of the proceedings is made available. A waiver of the preliminary hearing on the criminal charge shall not have the effect of waiving the right to a preliminary hearing on the parole revocation. The Adult Parole Authority may use the findings of the judge or magistrate in any such case in its determination whether such parolee may be declared a parole violator as that term is used in Section 2967.15, Ohio Revised Code.

(K) A written notice shall be given to the parolee within five business days of the date on which probable cause has been found. The notice shall apprise the parolee of the specific parole violations which have been alleged and shall disclose the evidence against him. If probable cause is found that the parolee is in violation of his parole and his return is imminent, he shall be informed of his right to submit application for admittance and treatment in a Community Re-Integration Center, unless he has been declared a parole violator as that term is used in Section 2967.15, Ohio Revised Code. Admittance to the readjustment program will be determined by the Center Director, subject to review by the Superintendent of

Parole Supervision, and subject to the parolee's not being declared a parole violator. Said notice shall further notify the parolee of his right to a parole revocation hearing, shall state the approximate time and place at which hearing shall take place, and shall inform him of his rights at said hearing.

7. When a parolee has been arrested or held by means of a detainer placed on the authority of or at the direction of an officer of the Adult Parole Authority, and a determination has been made that there is probable cause to believe that the parolee has violated the terms and conditions of his parole (that is, that the A.P.A. has declared the parolee to be a parole violator), the parolee shall be given a parole revocation hearing within sixty calendar days of the date of the placement of the detainer, or at such later reasonable time as the parolee may request. The following requirements shall apply to such cases:

(A) The revocation hearing shall be for the purpose of determining whether or not the parolee has violated the terms and conditions of parole, and if that is the case, whether or not the facts proven warrant revocation of parole.

(B) The hearing referred to herein shall be conducted by Parole Board members and hearing officers forming a hearing panel who are neutral and detached from the facts of the particular case under consideration.

(C) The parolee shall be permitted to appear at the hearing, to speak in his own behalf, and to bring letters, documents, or individuals who can

give relevant information to the hearing officer. Said individuals shall be subpoenaed by the Adult Parole Authority at the request of the parolee.

(D) Persons who have given adverse information on which the parole revocation is to be decided shall be made available for questioning and cross-examination by the parolee, unless the hearing panel determines that the identity of such persons are not known to the parolee and that such persons would be subjected to the risk of harm if their identities were disclosed.

(E) A summary or digest of the evidence and the proceedings shall be prepared by the hearing board and shall include the specific reasons for non-disclosure of the identity of any person under paragraph 7(D) of this order.

(F) The hearing panel shall report its findings to the Adult Parole Board which shall base its decision only on the evidence adduced at said hearing and shall state the reasons for its decision and the evidence relied on in its summary or digest.

(G) Counsel shall be provided in cases wherein, after being informed of his right to request counsel, the parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violations of the conditions of his parole; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or to present. In

passing on the request for appointment of counsel, the hearing panel shall consider whether the parolee appears to be capable of speaking effectively for himself. In all cases in which counsel is not provided for the parolee, the reasons for denial shall be succinctly stated in the summary or digest prepared by the hearing panel.

8. The Court shall retain jurisdiction for a period of one year from the date of entry of judgment or until further order of the Court for the purposes of receiving from defendants any administrative bulletins, rules or regulations promulgated pursuant to any order entered in this case. Copies of such material shall be submitted to this Court and counsel for plaintiffs within ten (10) days of its promulgation. Further the Court during that time may hear and determine any motions by any interested party to modify any such order. This section shall not in any way alter or diminish this Court's power to enforce its orders.

9. In the case of a parolee against whom a detainer is placed for parole violation in a state other than the State of Ohio, the time limitations contained herein for the conducting of any proceedings shall be tolled until such time as the parolee is returned to confinement within the boundaries of the State of Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. C 72-1052

JUDGE CELEBREZZE
JUDGE GREEN
JUDGE CONTIE

INMATES' COUNCILMATIC VOICE, et al.,
Plaintiffs,

vs.

DAVID ROGERS, et al.,
Defendants.

JUDGMENT ENTRY AND ORDER
[FILED AUG. 19, 1975]

This cause was heard by this Court upon remand from the United States Supreme Court. On June 23, 1975, that Court entered the following Order vacating the Judgment entered by this Court on December 12, 1974:

> "The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Ohio so that a fresh order or decree may be entered from which a timely appeal may be taken to the United States Court of Appeals for the Sixth Circuit. Mr. Justice Douglas took no part in the consideration or decision of this case."

Pursuant to the above Order, it is, as of this date, ORDERED, ADJUDGED, DECREED and DECLARED that the manner in which the Defendants

herein have been enforcing Ohio Revised Code Chapters 2967 and 5149 as they relate to revocation of parole is unconstitutional. It is FURTHER ORDERED, ADJUDGED, DECREED and DECLARED that the principles set forth in Exhibit "A", a stipulation of the parties as approved by the Court, and incorporated herein as if fully rewritten, represent the minimum due process requirements which must be met in causing the revocation of parole under Ohio Revised Code Chapters 2967 and 5149 after the date of this Order.

Pursuant to the Court's Memorandum Opinion herein, paragraph seven of Exhibit "A" represents a finding in Plaintiffs' favor, the Court having rejected Defendants' proposed paragraph seven. Further, paragraph nine of Exhibit "A" represents a finding in Defendants' favor, the Court having rejected Plaintiffs' proposed paragraph nine. Finally, should modification of the parole revocation procedures promulgated by Defendants in response to the Court's prior Order of December 12, 1974, as approved by the Court on July 15, 1975, or enactment of new procedures, occur, the Court orders that copies of any such procedures be submitted both to the Court and to counsel for Plaintiffs at least ten (10) days prior to their effective date.

/s/ ANTHONY J. CELEBREZZE
United States Circuit Judge

/s/ BEN C. GREEN
United States District Judge

/s/ LEROY J. CONTIE, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C 2-75-609

WILLIAM L. MOSS,
Petitioner,

vs.

ROGER T. OVERBERG
Respondent.

ORDER
[FILED DEC. 22, 1975]

It is hereby ORDERED that respondent file a supplemental memorandum in support of its motion to dismiss within twenty (20) days of the date of this Order setting out:

1. The regulations of the Ohio Adult Parole Authority governing parole revocation hearings for Ohio parolees who are, subsequent to their paroles, convicted in an Ohio court of common pleas for a felony offense and sentenced to a term of incarceration.
2. What action the Ohio Adult Parole Authority has taken on petitioner's June, 1970 Franklin County burglary conviction (prison number 45908) and subsequent parole since it declared him a parole violator on December 13, 1974.
3. What effect the 1970 burglary conviction has on petitioner's eligibility for parole on his November, 1974 Franklin County convictions. See, R.C. §§ 2967.13, 2967.25.

4. Whether the Ohio Adult Parole Authority ever intends to accord petitioner a parole revocation hearing on his June, 1970 conviction; and, if so, when and under what circumstances.

/s/ ROBERT M. DUNCAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C 2-75-609

WILLIAM L. MOSS,
vs.
ROGER T. OVERBERG

JUDGMENT
[FILED APR. 19, 1976]

This action came on for consideration before the Court, Honorable Robert M. Duncan, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that respondent's motion to dismiss is meritorious and therefore it is GRANTED. This action is hereby DISMISSED.

Dated at Columbus, Ohio, this 19th day of April, 1976.

Approved for Entry.

/s/ ROBERT M. DUNCAN
United States District Judge

/s/ JOHN D. LYTER
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C 2-75-609

WILLIAM L. MOSS,

Petitioner,

vs.

ROGER T. OVERBERG

Respondent.

OPINION AND ORDER
FILED APRIL 16, 1976

Petitioner, a State prisoner, brings this action for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241(c)(3).

This matter is before the Court on respondent's motion to dismiss on the ground that the petition fails to state a claim for relief under the Constitution and laws of the United States.

Petitioner was indicted in the April, 1970 Term of the Franklin County, Ohio Common Pleas Court for one count of burglary of an inhabited dwelling in violation of former R.C. 2907.09 and one count of grand larceny in violation of former R.C. 2907.20. On June 15, 1970, petitioner, represented by counsel, entered a plea of guilty to one count of burglary of an inhabited dwelling. The larceny charge was dismissed. The Court sentenced petitioner to a term of five (5) to thirty (30) years imprisonment in the Ohio State Reformatory.

On March 25, 1974, petitioner was placed on furlough. On August 20, 1974, petitioner was paroled. Petitioner was indicted in the September, 1974 Term of the Franklin County, Ohio Common Pleas Court for one count of forgery in violation of R.C. 2913.31; one count of aggravated robbery in violation of R.C. 2903.31; and one count of having a weapon while under a disability in violation of R.C. 2923.13. On November 20, 1974, petitioner, represented by counsel, entered pleas of guilty to one count of forgery, one count of assault, and one count of having a weapon while under a disability. Petitioner was sentenced to concurrent terms of two (2) to five (5) years, six months, and two (2) to five (5) years imprisonment.

On December 6, 1974, petitioner was returned, for classification, to the Ohio penal system. On December 13, 1974, he was declared a parole violator. In accordance with the Regulations then in force[1] plaintiff was not provided a parole revocation hearing. Defendants state in their brief that they do not intend to provide plaintiff with a parole revocation hearing.

Petitioner alleges that he has been deprived of his constitutional rights in that:

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[1] On or about July 15, 1975, new regulations were adopted by the Ohio Adult Parole Authority which provide for a parole revocation hearing for a prisoner who is convicted of a subsequent offense while on parole. These regulations were adopted in accordance with an Order of the United States District Court for the Northern District of Ohio in *Inmates' Councilmatic Voice, et al. v. David Rogers, et al.*, No. C 72-1052 (N.D. Ohio E.D. 1972). An appeal is now pending in the United States Court of Appeals for the Sixth Circuit on the sole issue of the timing of the revocation hearing.

1. He was denied a parole revocation hearing; and

2. He was denied the right to the assistance of counsel for a parole revocation hearing.

In general, a parolee is entitled to a preliminary and final parole revocation hearing before the parole authority can revoke his parole and return him to prison. *Morrissey v. Brewer*, 408 U.S. 471, 486-488 (1972). The parole revocation hearing must consider both whether the parolee has indeed violated the terms and conditions of his parole and whether, if he has, his parole should be revoked or he should be continued on parole because of mitigating circumstances. *Id.* at 488. Petitioner has no right to a determination of whether or not he violated the terms and conditions of his parole because the 1974 criminal convictions establish the parole violation. He may not relitigate those convictions in a parole hearing. *Id.* at 490. The sentencing Court's commitment order precludes reinstatement on parole because of mitigating circumstances. See also, R.C. 2929.41. Ohio law provides that once a parolee is returned to prison as a result of a subsequent criminal conviction, his parole eligibility is determined by subtracting the time served on his prior minimum sentences from the aggragated minimum sentences of all the convictions for which he is incarcerated. O.A.G. No. 75-097. See also, R.C. §§ 2967.13, 2967.19, and 2967.25. The first time the parole authority can consider reinstating the parolee on parole is after he has served the aggregated minimum less the time he served on his prior minimum sentences. Holding a parole revocation hearing under such circumstances would be futile.

In *Preston v. Piggman*, 496 F. 2d 270, 274 (6th Cir. 1974), which construes *Morrissey* to require a final revocation hearing concerning mitigating circumstances even where the parolee admits violation of a condition of his parole, the Court of Appeals was not concerned with a situation in which the resurrection of the parolee's prior sentence of confinement was accomplished during imposition of sentence for a subsequent felony conviction. Petitioner's prior sentence of confinement was revisited upon him not as incident to a *Morrissey*-type revocation situation, but as incident to his guilty plea and sentence in case number 74CR-11-2047. The entry in that case expressly provides that the two-to-five years sentence "is to be served consecutively to the defendant's present parole from Chillicothe Correctional Institute." By operation of the Ohio statutes cited above and this judgment entry in the state court, Mr. Moss' case is not within the *Piggman* rationale.

Accordingly, the Court HOLDS that the Ohio Adult Parole Authority did not deprive petitioner of any of his due process rights set out in *Morrissey v. Brewer*, *supra* when it denied him a parole revocation hearing. *See, Smith v. Perini*, No. C 75-200 (N.D. Ohio W.D. 1975); *Cook v. United States Attorney General*, 488 F. 2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846 (1975).

WHEREUPON, the Court HOLDS that respondent's motion to dismiss is meritorious, and therefore it is GRANTED. This action is hereby DISMISSED.

/s/ ROBERT M. DUNCAN
United States District Judge

No. 76-2533

United States Court of Appeals

FOR THE SIXTH CIRCUIT

WILLIAM LEE MOSS,
Petitioner-Appellant,
vs.
S. M. PATTERSON, Supt.,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Decided and Filed May 20, 1977.

Before: EDWARDS, CELEBREZZE and CECIL, Circuit Judges.

PER CURIAM. This is an appeal from the dismissal of a petition for a writ of habeas corpus. The sole issue on appeal is whether Appellant was deprived of due process of law when the Ohio Adult Parole Authority revoked his parole without holding a revocation hearing.

On June 15, 1970, Appellant pled guilty to burglary of an inhabited dwelling and was sentenced to a term of five to thirty years imprisonment. On March 25, 1974, he was placed on furlough and on April 20, 1974, he was paroled. While on parole, Appellant was indicted in the September, 1974 term of the Franklin County, Ohio common pleas court for one count of

forgery, one count of aggravated robbery, and one count of possessing a weapon while under a disability. On November 20, 1974, Appellant pled guilty to forgery, assault, and possession of a weapon while under a disability and was sentenced to two to five years on the forgery and weapon counts, and six months on the assault count, to be served concurrently.[1] On December 13, 1974, Appellant was declared a parole violator. In accordance with regulations then in force, he was not afforded a parole revocation hearing. Appellant petitioned for a writ of habeas corpus from his sentence on the 1970 conviction, but the petition was denied by the District Court. The Court noted that Appellant's violation of a condition of parole is conclusively established by the 1974 felony convictions. A parolee is not free to relitigate intervening criminal convictions in a parole revocation hearing. The District Court also decided that it would be futile to hold a final revocation hearing on mitigating circumstances because OHIO REV. CODE § 2929.41 automatically precludes reinstatement on parole until after a statutory minimum

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[1] The common pleas judge stipulated that the two to five year sentence imposed in case number 74CR-11-2047 was to be served consecutively to Appellant's present parole sentence. The District Court characterized Appellant's confinement on the prior sentence as a consequence of his guilty plea on the 1974 charge rather than as incident to a parole revocation. More likely, however, the common pleas judge assumed revocation of Appellant's parole when sentencing Appellant on the 1974 conviction so the principles of *Morrissey v. Brewer* are still applicable. *See also* discussion note 3.

sentence is served.[2] Since no purpose would be served by a revocation hearing, the District Court held that the Adult Parole Authority had not deprived Appellant of due process by summarily revoking his parole. We reverse.

In *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972), the Supreme Court recognized that a parolee has significant liberty interest in a parole which is entitled to protection under the Due Process Clause. At minimum, due process requires that the parolee be given a hearing before revocation of his parole. 408 U.S. at 487-90. "The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Id.* at 488. We agree with the District Court that Appellant may not relitigate

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[2]

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment. In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state penal or reformatory institution.

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

(2) When it is imposed for a violation of division (B) of section 2921.34 of the Revised Code, or division (B) of section 2921.35 of the Revised Code.

(3) When it is imposed for a new felony committed by a probationer, parolee, or escapee.

OHIO REV. CODE § 2929.41

his 1974 felony convictions at a revocation hearing. *See id.* at 490. However, in *Preston v. Piggman*, 496 F. 2d 270, 274 (6th Cir. 1974), this Court held that, even if a parolee admits violation of a condition of parole, he is still entitled to present evidence in mitigation. *See also Pope v. Chew*, 521 F. 2d 400, 404-05 (4th Cir. 1975); *Caton v. Smith*, 486 F. 2d 733, 735 (7th Cir. 1973). We are not convinced that provision of a revocation hearing is a useless gesture where a condition of parole is violated by an intervening felony conviction. Counsel for the Adult Parole Authority admitted that since the decision in *Inmates Councilmatic Voice v. Rodges*, No. C 72-1052 (N.D. Ohio 1974), *aff'd and modified*, 541 F. 2d 633 (6th Cir. 1976), the Adult Parole Authority has promulgated rules pursuant to stipulations entered in that case which afford final revocation hearings in all cases, including those where a parolee is convicted of a new crime. The construction placed on OHIO REV. CODE § 2929.41(b) (3) by the District Court would render those regulations a nullity in cases involving a subsequent felony conviction, or at best, transform the hearing into an empty formalism. In *Preston v. Piggman*, 496 F. 2d at 275 n.1, the Court commented that "[t]he automatic revocation of parole for every parole violation regardless of the mitigating circumstances clearly runs counter to the dictates of the [Supreme] Court in *Morrissey v. Brewer*." To construe OHIO REV. CODE § 2929.41(b)(3), as did the District Court, would create a class of cases where parole revocation is automatic, without benefit of a meaningful hearing on mitigation. This result would conflict with the doctrine expressed by the Supreme Court in *Morrissey v. Brewer* and its progeny, as interpreted by this Court in *Preston v. Piggman*. A more

reasonable construction of OHIO REV. CODE § 2929.41 (b) (3) is that it has nothing whatsoever to do with when a parole should be revoked, but was designed to set out rules for the imposition of sentence on a subsequent conviction after a parole has been revoked.[3] Regardless of how the statute is construed, we adhere to the opinion expressed in *Inmates Councilmatic Voice v. Rodgers*, 541 F. 2d at 636, that a parolee convicted of a subsequent crime is entitled to a parole revocation hearing if he requests it and the hearing should be held within a reasonable time. The judgment of the District Court is reversed and remanded with instructions to order the Adult Parole Authority to provide Appellant with a revocation hearing within a reasonable time.

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[3] This interpretation of the section is supported by the Committee Comment to § 2929.41:

> This section provides rules for determining when sentences are to be served concurrently or consecutively, places maximums on consecutive sentences, and allows courts to commit offenders to the penitentiary or reformatory when consecutive misdemeanor sentences totalling more than one year are imposed.

The section does not authorize the courts to order revocation of a parole on a previous sentence, that authority remains the province of the Adult Parole Authority, it merely gives the court in the subsequent criminal proceedings guidance as to when a sentence is to run consecutively or concurrently.

No. 76-2533

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM LEE MOSS,
Petitioner-Appellant,
v.
S. M. PATTERSON, Supt.,
Respondent-Appellee.

ORDER
[FILED JUNE 17, 1977]

Before: EDWARDS and CELEBREZZE,
Circuit Judges, and
CECIL, Senior Circuit Judge.

Respondent-Appellee filed a petition for rehearing with a request for rehearing en banc. No Judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is Ordered that the petition for rehearing be denied.

Entered By Order of the Court

JOHN P. HEHMAN, *Clerk*

§ 2929.41 Multiple sentences.

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment. In any case, a sentence of imprisonment for misdemeanor shall be served concurrently with a sentence of imprisonment for felony served in a state penal or reformatory institution.

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

(2) When it is imposed for a violation of division (B) of section 2917.02 of the Revised Code, section 2921.34 of the Revised Code, or division (B) of section 2921.35 of the Revised Code;

(3) When it is imposed for a new felony committed by a probationer, parolee, or escapee.

(C) Subject to the maximums provided in division (E) of this section:

(1) When consecutive sentences of imprisonment are imposed for felony under division (B) (1) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed, and the maximum term to be served is the aggregate of the consecutive maximum terms imposed;

(2) When consecutive sentences of imprisonment are imposed for felony under division (B) (2) or (3) of this section, the minimum term to be served is the aggregate of the consecutive minimum terms imposed

reduced by the time already served on any such minimum term, and the maximum term imposed is the aggregate of the consecutive maximum terms imposed.

(D) Subject to the maximum provided in division (E) of this section, when consecutive sentences of imprisonment are imposed for misdemeanor, the term to be served is the aggregate of the consecutive terms imposed.

(E) Consecutive terms of imprisonment imposed shall not exceed:

(1) An aggregate minimum term of twenty years, when the consecutive terms imposed include a term of imprisonment for murder;

(2) An aggregate minimum term of fifteen years, when the consecutive terms imposed are for felonies other than aggravated murder or murder;

(3) An aggregate term of eighteen months, when the consecutive terms imposed are for misdemeanors. When consecutive terms aggregating more than one year are imposed for misdemeanors under the Revised Code, and at least one such consecutive term is for a misdemeanor of the first degree, the trial court may order the aggregate term imposed to be served in a state penal or reformatory institution.

§ 2967.25 Parole eligibility when serving consecutive sentences.

A person serving several indeterminate sentences consecutively becomes eligible for parole upon the expiration of the aggregate of the minimum terms of his several sentences diminished as provided in section 2967.19 of the Revised Code.